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January 19, 2016

EX PARTE VIA ECFS

Ms. Marlene H. Dortch Secretary Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554

Re: Ex Parte Notification

Application of AT&T Mobility Spectrum LLC and East Kentucky Network, LLC for Consent to Assign Licenses, WT Docket No. 15-79, Application File No. 0006672533

Dear Ms. Dortch:

The FCC adopted its "enhanced factor" review in 2014 with the purpose of "ensur[ing] that all Americans, regardless of whether they live in an urban, suburban, or rural area, can enjoy the benefits that competition provides." But with the FCC having never denied a transaction under this standard, the aspirational words of the *Mobile Spectrum Holdings Order* have begun to ring hollow. If ever there were a transaction the FCC should deny under "enhanced factor" review, it is AT&T's proposed acquisition of low-band spectrum in parts of West Virginia, Ohio and Kentucky. These are mostly rural markets where AT&T already controls 60 percent of the market in some areas and stands to benefit from excluding competitive entry. These are also markets where

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¹ Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions, Report and Order, 29 FCC Rcd 6133 ¶ 1 (2014) ("Mobile Spectrum Holdings Order").

² AT&T Mobility Spectrum LLC and East Kentucky Network, LLC Seek FCC Consent to the Assignment of Three Lower 700 MHz C Block Licenses in Kentucky, Ohio, and West Virginia, Public Notice, WT Docket No. 15-79, DA 15-617 (rel. May 21, 2015).

³ See Petition to Deny of T-Mobile USA, Inc., WT Docket No. 15-79, at 2-3 (filed June 22, 2015) ("Petition")

competitors have no material low-band spectrum holdings and AT&T is willing to pay more than [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTAIL INFORMATION] to keep spectrum away from its competitors.⁴ It is also a case of significant precedential value that AT&T rightly knows could reinforce similar foreclosure strategies in even larger markets. For these reasons T-Mobile USA, Inc. ("T-Mobile")⁵ urges the Commission to uphold the *Mobile Spectrum Holdings Order* and deny AT&T's latest attempt to raise its rivals' costs at the expense of consumers by exceeding the one-third threshold that triggers "enhanced factor" review.

Approval of this Transaction Would Set a Dangerous Precedent

Approving this transaction would send a signal that the FCC may permit even more farreaching acquisitions in the future. AT&T has already sought or received approval for seventeen separate "enhanced factor" low-band spectrum acquisitions that cover more than six million Americans. If the FCC were to approve this transaction, AT&T would have no incentive to stop acquiring low-band spectrum in rural areas, but rather will logically seek to extend its foreclosure strategy to suburban and urban areas where any one transaction could close the door on competitive choice for tens of millions of additional Americans.

⁴ See Reply to Oppositions to Petition to Deny of T-Mobile USA, Inc., WT Docket No. 15-79, Decl. of Scott Sundblad at 2-3 (filed July 10, 2015) ("Reply").

⁵ T-Mobile USA, Inc. is a wholly owned subsidiary of T-Mobile US, Inc., a publicly traded company.

⁶ See AT&T/East Kentucky Network, LLC, WT Docket No. 15-79 (approx. 710,000 POPs); AT&T/Plateau Wireless, WT Docket No. 14-144 (approx. 451,850 POPs); AT&T/Kaplan Tel. Co., WT Docket No. 14-167 (approx. 537,943 POPs); AT&T/KanOkla Tel. Assoc., WT Docket No. 14-199 (approx. 200,000 POPs); AT&T/Worldcall Inc., WT Docket No. 14-206 (approx. 315,000 POPs); AT&T/Consolidated Tel. Co., WT Docket No. 14-254 (approx. 300,000 POPs); AT&T/Viaero, ULS File No. 0006410840 (approx. 6,971 POPs); AT&T/Club 42, WT Docket No. 14-145 (approx. 419,818 POPs); AT&T/Pine Cellular, WT Docket No. 15-13 (approx. 105,000) POPs); AT&T/Agri-Valley Communications, Inc., WT Docket No. 15-181 (approx. 1.110.478) POPs); New Cingular Wireless/NEP Cellcorp, Inc., WT Docket No. 15-221 (approx. 295,081 POPs); AT&T/Peoples Wireless Services, WT Docket No. 15-267 (approx. 500,319 POPs); AT&T/Cellular Properties, Inc., WT Docket No. 15-78 (approx. 47,000 POPs); New Cingular Wireless PCS, LLC/Bluegrass Cellular, WT Docket No. 15-225 (approx. 1,482,048 POPs); AT&T/Blanca Tel. Co., WT Docket No. 15-270 (approx. 29,530 POPs); New Cinqular Wireless PCS, LLC/Farmers Telecomms. Corp., WT Docket No. 15-271 (approx. 150,325 POPs). AT&T's also seeks consent to assignment of Cellular and AWS spectrum licenses from Tampnet covering the Gulf of Mexico, which does not have a permanent population. See AT&T/Tampnet, WT Docket No. 15-255.

Denying the proposed acquisition, by comparison, would encourage the present licensee either to fulfill its substantial service milestones, or to sell these licenses to an interested party other than AT&T, such as T-Mobile. Unlike an acquisition by AT&T, either of these latter options would enhance competition and promote the public interest in the timely and cost-effective deployment of broadband services to the public. For its part, T-Mobile stands ready to acquire the spectrum in these markets at market-based, non-foreclosure prices, and if allowed to do so, will deploy the spectrum quickly for the benefit of consumers. T-Mobile has nearly tripled its coverage area since acquiring its first 700 MHz licenses in 2014, bringing another competitive option to millions of wireless consumer in these geographies. T-Mobile has already heavily invested in its Lower 700 MHz spectrum acquisitions and intends to reinforce its investment and augment competition in those markets by opening new retail stores in those markets where it has acquired Lower 700 MHz spectrum. Indeed, approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] of all of new T-Mobile retail stores, kiosks and other sales outlets scheduled to launch in 2016 will open in those markets where T-Mobile has acquired low-band 700 MHz spectrum.7

AT&T's Latest Claims are Without Merit

T-Mobile also responds to AT&T's most recent submission in this proceeding. AT&T fails to explain its contradictory positions regarding the value of low-band spectrum in the affected markets and fails to rebut evidence of foreclosure pricing and consumer harm.⁸ The Commission should promote competition and greater consumer choice by denying AT&T's proposed acquisition.

First, AT&T promised the FCC rapid LTE deployment on the 700 MHz spectrum it seeks to acquire in this proceeding, but told the FCC in a contemporaneous waiver request that it actually would need "many years" to deploy LTE in the Kentucky-6 CMA and

⁷ See Declaration of Jon Freier, attached as Exhibit A. T-Mobile's strong record of rapid deployment and investment is referenced here to demonstrate the relative weight of AT&T's claimed public interest benefits compared to the significant resulting public interest harms AT&T's proposed acquisition would inflict on consumers, not to suggest the FCC can or should choose the best steward of these low-band spectrum resources. See, e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses, et al., Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd 10698 ¶ 72 (2012) (noting that the Commission will evaluate various characteristics of the markets involved that would allow rival service providers to provide an effective competitive constraint in the marketplace).

⁸See Ex Parte Letter from Michael Goggin, General Attorney, AT&T Services, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 15-79 (filed Jan. 11, 2016) ("AT&T Ex Parte").

other areas.⁹ AT&T attempts to explain away the contradiction by asserting its representations to the FCC about "rapid" deployment in this transaction actually did not refer to the Kentucky-6 CMA, but rather to the other two CMAs it seeks to acquire in this transaction.¹⁰ AT&T adds that LTE deployment in these markets will not take "many years" as AT&T had previously said it would in its cellular waiver request, but actually will require "only" twelve to fifteen months.¹¹ AT&T's statements strain credulity. AT&T repeatedly referred to the ostensibly rapid deployment resulting from its proposed acquisition as affecting all three of the markets at issue in this proceeding.¹² And while AT&T never provided the FCC with a definitive deployment date for the spectrum it seeks to acquire, AT&T repeatedly implied near-immediate availability, not the twelve to fifteen months it now says LTE deployment will require, much less the "many years" that AT&T continues to claim 700 MHz LTE deployment will require in the Kentucky-6 CMA in its still-pending waiver request.¹³ AT&T's latest submission does nothing to resolve the fundamental contradictions surrounding when and whether the markets at issue here will see LTE deployment in the Lower 700 MHz band.

AT&T's statements regarding its buildout plans for the 700 MHz spectrum and its various unconvincing explanations since then strongly suggest the purpose of its proposed acquisition is anti-competitive foreclosure, not pro-consumer deployment, investment and innovation. The Department of Justice warned the FCC about precisely this type of behavior when it said that a "foreclosure strategy is not merely theoretical – specific facts about the wireless industry, such as high market concentration, high margins, and scarce critical inputs, make anticompetitive foreclosure more likely" and that "it is essential to maintain vigilance against any lessening of the intensity of competitive forces . . . in the wireless industry." The FCC rightly remains

⁹ Compare Opposition of AT&T to Petition to Deny, WT Docket No. 15-79 at 6-7 (filed July 2, 2015) ("AT&T Opposition") with AT&T Petition for Waiver for Licenses in Kentucky and Tennessee, WT Docket No. 15-300 at 11 (filed Dec. 11, 2015) ("AT&T Waiver Petition").

¹⁰ AT&T Ex Parte at 3.

¹¹ Id.

¹² See, e.g., AT&T Opposition at 6-7 ("there are substantial public interest benefits to an acquisition that would allow the acquirer to expeditiously deploy unused 700 MHz spectrum"); Public Interest Statement at 3, n.12 (citing as support for the transaction the Commission's previous finding that the Lower 700 MHz build-out benchmarks "should help ensure that AT&T makes significant deployments of these licenses quickly").

¹³ See id.; AT&T Ex Parte at 3; AT&T Waiver Request at 11.

¹⁴ Ex Parte Letter from William J. Baer, Assistant Attorney General, U.S. Dept. of Justice to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-269 at 2 (filed May 14, 2014); see also Ex Parte Submission of the U.S. Dept. of Justice, WT Docket No. 12-269 at 14 (filed April 11, 2013) ("Today, the two leading carriers have the vast majority of low-frequency spectrum, whereas the two other nationwide carriers have virtually none. This results in the two smaller nationwide carriers having a somewhat diminished ability to compete, particularly in rural areas

attentive to the potential for foreclosure in all markets. But AT&T's dominant market share and the high-concentration of low-band spectrum resources in these markets make the DOJ's concerns especially relevant.

Second, AT&T's latest submission attempts to evade its own inconsistent statements about the timing of its 700 MHz LTE deployment by claiming, falsely, that T-Mobile has asserted that 700 MHz spectrum is a "competitive prerequisite" for LTE deployment. T-Mobile has said no such thing. But AT&T would like the FCC to focus on this non-issue rather than the actual question of whether or not a competitor can *cost-effectively* deploy LTE in difficult environments, such as the sparsely populated, rugged terrain at issue in this proceeding, without low-band spectrum. The answer to the latter question, unfortunately, is no. ¹⁶

Third, the facts of this case are far more egregious than those of AT&T's recently approved Club 42 acquisition.¹⁷ In the case of *Club 42*, the FCC found that all four nationwide carriers possessed significant market share in the relevant markets.¹⁸ But in this case, AT&T alone dominates these markets with greater than 60 percent of the market share in some areas and T-Mobile meanwhile has virtually no presence in these markets.¹⁹ In the case of *Club 42*, the FCC also concluded that all four nationwide carriers had sufficient low-band spectrum to deploy a 5+5 megahertz LTE carrier.²⁰ In contrast, T-Mobile has no low-band spectrum *at all* in the affected markets in this case and Sprint holds only 14 MHz of low-band spectrum.²¹ In the *Club 42* decision, the FCC held that AT&T's acquisition of the licenses would not "foreclose expansion into hitherto unserved geographic portions of the market."²² But in this case, T-Mobile has explained

where the cost to build out coverage is higher with high-frequency spectrum. The Commission's policies . . . can potentially improve the competitive landscape by preventing the leading carriers from foreclosing their rivals from access to low-frequency spectrum.") (emphasis added).

¹⁵ AT&T Ex Parte at 2.

¹⁶ See Mobile Spectrum Holdings Order ¶¶ 50-51 (2014) (discussing low-band spectrum's potential to promote the benefits of competitive coverage in rural areas and finding that "[t]he limited efforts by AT&T and Verizon Wireless to minimize the force of [low-band spectrum's benefits] are not persuasive").

¹⁷ See AT&T Ex Parte at 2 (citing Application of AT&T Mobility Spectrum LLC and Club 42CM Limited Partnership For Consent To Assign Licenses, Memorandum Opinion and Order, 30 FCC Rcd 13055 (2015) ("Club 42 MO&O").

¹⁸ Club 42 MO&O ¶¶ 36-37.

¹⁹ See Petition at 2-3.

²⁰ Club 42 MO&O ¶¶ 35, 38.

²¹ See Public Interest Statement at Ex. 4, 1-3.

²² Club 42 MO&O ¶ 38.

that it simply cannot enter these sparsely populated markets on a cost-effective basis without access to low-band spectrum, which is why T-Mobile has expressed its interest in acquiring the licenses at issue here. ²³ Finally, in the *Club 42* markets, the four nationwide providers offered a relatively similar amount of 4G network coverage, whereas here AT&T and Verizon offer substantially broader 4G LTE coverage than either T-Mobile or Sprint. ²⁴

Indeed, the only common element AT&T can identify between the *Club 42* transaction and the current application is that the seller in these markets offered its licenses for sale through a broker. As T-Mobile has explained, however, acquiring licenses at foreclosure-level pricing—even through a broker—is still foreclosure. By any measure the price that AT&T has offered to pay for spectrum in these sparsely populated areas – and, hence, the price that the seller demanded with AT&T's foreclosure-level offer in hand – greatly exceeded what any other reasonable buyer, including T-Mobile, would be willing to pay. The simplest explanation for AT&T's otherwise anomalous pricing is the most logical one: AT&T is seeking to acquire the low-band spectrum at issue here at foreclosure-level prices.

The record evidence of this case demonstrates that allowing AT&T's acquisition to proceed would bring few, if any, comparable public-interest benefits but would come replete with public-interest harms. Approving AT&T's proposed transaction promises fewer competitive choices, higher quality-adjusted prices and less access to innovative product and service offerings. The FCC should deny AT&T's proposed low-band spectrum acquisition in this case.

²³ See Reply at 8-9.

²⁴ Compare Coverage Viewer, https://www.att.com/maps/reseller.html (last visited Jan. 15, 2016) and Coverage Locator, https://vzwmap.verizonwireless.com/dotcom/coveragelocator/ (last visited Jan. 15, 2016) with 4G LTE Coverage | Check Your 4G Coverage | T-Mobile, http://www.t-mobile.com/coverage.html (last visited Jan. 15, 2016) and Sprint – Nationwide Coverage, https://coverage.sprint.com/IMPACT.jsp? (last visited Jan. 15, 2016); see also 3G and 4G LTE Cell Coverage Map – OpenSignal, http://opensignal.com/ (last visited Jan. 15, 2016).

²⁵ AT&T Ex Parte at 2.

²⁶ See Reply at 8-10.

²⁷ Id.

Under section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced docket. Please direct any questions regarding this filing to me.

Respectfully submitted,
/s/ Trey Hanbury
Trey Hanbury
Counsel to T-Mobile USA, Inc.

CERTIFICATE OF SERVICE

I, C. Sean Spivey, hereby certify that on January 19, 2016, I caused true and correct copies of this redacted, ex parte letter to be served on the following via first-class mail, hand-delivery, or electronic mail, as indicated:

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